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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 39

LAWRENCE GEORGE HENRY and DION TYRONE DIAMOND,

Petitioners,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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COMMONWEALTH OF VIRGINIA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioner prays that a writ of certiorari issue to review the judgments of the Supreme Court of Appeals of Virginia entered April 25, 1961, in the above-entitled cause.

Opinion Below

The Supreme Court of Appeals of Virginia issued the orders complained of without opinion. The orders are appended hereto, *infra* at pages 1a, 2a.

Jurisdiction

The judgments sought to be reviewed are those of the Supreme Court of Appeals of Virginia, dated April 25, 1961, refusing petitions for writs of error and supersedeas to review judgments rendered against petitioners by the

Circuit Court of Arlington County, Virginia, on November 3, 1960, in a prosecution for criminal trespass (*infra* pages 1a, 2a). The effect of the denial of the petitions for writs of error and supersedeas is to affirm said judgments.

On July 19, 1961, the time for filing a petition for writ of certiorari was extended by Mr. Justice Clark to and including August 23, 1961.

The jurisdiction of this Court to review the judgment below rests on Title 28 U. S. C. § 1257(3).

Questions Presented

1. Whether the State criminal trespass statute interpreted and applied in the instant case so as to eliminate any requirement of scienter or *mens rea* is violative of the due process clause of the Fourteenth Amendment.

2. Whether the due process and equal protection clauses of the Fourteenth Amendment permit the state to use its executive and judiciary to enforce the racially discriminatory practices of a business which has opened its property to the general public by invoking the state criminal trespass statute to enforce such racial discrimination within the same property.

3. Whether the convictions obtained below infringe rights of expression and of association and the right to contract and to secure property, and to otherwise enjoy the liberties of free men, which are guaranteed by the Fourteenth Amendment.

Statutory and Constitutional Provisions Involved

1. These cases involve § 1 of the Fourteenth Amendment to the Constitution of the United States.

2. These cases also involve the following provision of the Code of Virginia (1950, as amended 1960):

> § 18.1-173. Trespass after having been forbidden to do so.—If any persons shall without authority of law go upon or remain upon the lands, *buildings* or premises of another, *or any part, portion or area thereof,* after having been forbidden to do so, *either orally or in writing,* by the owner, lessee, custodian or other person lawfully in charge *thereof,* or after having been forbidden to do so by a sign or signs posted on *such lands, buildings, premises or part, portion or area thereof* at a place or places where *it or* they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one *thousand dollars* or by confinement in jail not exceeding *twelve months,* or by both such fine and imprisonment. (Portions italicized added by 1960 amendment.)

Statement

These cases like the "Richmond Student Protest Cases" filed in this Court on July 22, 1961, *Randolph* v. *Commonwealth of Virginia,* 30 U. S. Law Week 3040 (No. 248, Oct. Term 1961), involve the issue of whether the Virginia trespass statute may be used to convict Negroes previously admitted to a restaurant, and permitted to purchase articles to take out, but refused food service at a counter solely because of their race, for failure to leave the premises when told to do so.

On the 10th day of June, 1960, petitioners went into Howard Johnson's Restaurant in Arlington County where they purchased and requested receipts for popcorn, chewing gum and candy from an assistant manager at a counter where these items were displayed and the cash register was located (Tr. 6). One of the petitioners sat down at the counter and was asked to leave by the manager (Tr. 3, 19). A police officer, who was sitting at the other end of the counter, was asked by the manager to take petitioners out (Tr. 4, 11). The manager had requested the petitioners to leave and asked for the aid of the police because he believed that there was a law prohibiting the restaurant from serving colored people (Tr. 15). Petitioners were well-mannered and conducted themselves properly (Tr. 13, 15, 20); they were asked to leave solely because of race (Tr. 17). They refused to do so and were arrested (Tr. 19).

The warrants of arrest, obtained and sworn to by Lieutenant E. A. Summers and Officer Donald W. Pelassaro of the Arlington County Police Department, charged petitioners for failing to leave the premises of Howard Johnson's Restaurant, 4700 Lee Highway, Arlington, Virginia, after having been requested to do so by the person lawfully in charge thereof, in violation of Title 18.1-173, Virginia Code 1950 (1960 Amendment) (R. 1, 2).

Petitioners' cases were consolidated and tried together on October 31, 1960, before a jury in the Circuit Court of Arlington County (Tr. 1). Various federal constitutional defenses were made throughout (R. 17, 18, 19, 20) and at the close of (R. 18, 20) the trial, but were overruled. The jury found both petitioners guilty as charged and fixed punishment at $25.00 fines (R. 18, 20).

On application to the Supreme Court of Appeals of Virginia, that Court, by a judgment or order, dated April 25, 1961, denied their petitions for writs of error and

supersedeas and thus affirmed the judgment of convictions below (Appendix, *infra*, 1a, 2a).

How the Federal Questions Were Raised and Decided

At the conclusion of the evidence for the Commonwealth, the petitioners "moved the Court to strike the evidence of the Commonwealth of Virginia, which said motion the Court denied and to which said ruling of the Court the (petitioners) excepted" (R. 17, 19). The reasons assigned by the petitioners were as follows:

First, that, if this statute does not require proof of "scienter" or "mens rea," the statute is unconstitutional; and, on the other hand, if the statute does require "scienter" or "mens rea," the Commonwealth failed to produce evidence that petitioners did not have a bona fide belief or claim of right and; therefore, that any conviction obtained without proof of this element would be violative of the due process clause of the Fourteenth Amendment (Tr. 25-26).

The second reason assigned by the petitioners in support of their motion to strike was that application and enforcement of Virginia's criminal trespass statute was use of the state's criminal process in a manner which fostered, implemented and enforced discrimination and exclusion on the basis of race in violation of the Fourteenth Amendment. The instant owner in pursuing a policy of denying service to all Negroes was not exercising any individual choice which he may or may not have to select or reject particular customers, but on the contrary the owner in the first instance was engaging in a racial classification as to an identified group because he believed compelled by law, custom, or fear of economic reprisals by other potential customers. When the owner sought and received the aid of the state to effectuate this policy and practice of racial

classification, discrimination and exclusion, such state action violated the Fourteenth Amendment.

The remaining reason assigned in support of petitioners' motion to strike was that application and enforcement of the criminal trespass statute under circumstances here where petitioners had entered the premises, made certain purchases, amounted to unwarranted state interference with the exercise of their constitutional rights protected by the Fourteenth Amendment.

Following argument by the Commonwealth's attorney in opposition thereto (Tr. 28-31), the court rendered an oral opinion which specifically treated and overruled each of these contentions (Tr. 31-34).

Subsequently, at the close of petitioners' case and during argument with respect to proposed instructions, their motion to strike the Commonwealth's evidence was renewed on the grounds previously assigned and again it was denied (Tr. 56). Moreover, over petitioners' objections, the court accepted Instruction 2 of the Commonwealth and refused Instruction E of petitioners (Tr. 55, 56)—the former excluding and the latter including the element of "mens rea" or "scienter" (see R. 7, 14; Tr. 57). At this juncture the court said (Tr. 56):

> "Well, I don't know whether it comes too late or not, but it is going to be refused. I have not changed my mind about it. I said that the gist of it lies in Instruction E that was refused, and Instruction 2 that was granted. I can see that is a really important question.
>
> As I indicated before, I do not find any cases which support the defendant's theory. The closest I can come to is the Barrows versus Jackson, and I do not think it goes this far, and I am not willing to go this far, unless

the Supreme Court says we have to go this far. I do not think the Supreme Court says that we have to go this far.

We have a conflict here of rights under the Fourteenth Amendment, and we have a conflict of property rights."

Again, after submission of the case to the jury, the court denied petitioners' federal contentions when the jury returned to the courtroom for further instructions, viz. (Tr. 61-62):

Jury Foreman: Your Honor, some of the jurymen have a question or two that probably if we understood might help us get to a fairly quick resolution of the problem. There are two questions.

The Court: Proceed.

Jury Foreman: The first one is, as used in Instruction 2, what does "authority of law" mean?

The Court: It means some writ of Court or some writ of tenancy or some legal right of that sort, some right of entry.

Jury Foreman: Right of entry?

The Court: Some legal writ of entry or some right of a tenant, some person who has the right of the property.

Jury Foreman: The second question is: Does "trespassing" mean that a person can be asked to leave a restaurant such as Howard Johnson's, serving the public, without cause?

The Court: Yes, sir.

Jury Foreman: Thank you.

To such further instructions, petitioners objected and noted an exception (Tr. 62).

After the verdict was rendered and the jury discharged, petitioners moved to set aside the verdict of the jury as contrary to the law and the evidence and without evidence to support it (Tr. 63). In disposing of this matter adversely to the petitioners, the court observed (Tr. 63):

> On the evidence, I don't think it is contrary to the evidence. It seems to me it would be futile to argue that.
>
> I think there are two legal questions here, but it seems to me it has already been argued. One of them is the question the jury just asked. The other one, which is closely analogous to the covenant case and how far the Court is going to go in that direction, on the grounds stated, is contrary to the law and evidence.

The Court further stated (Tr. 66):

> I consider two sections here. I do not consider that one too seriously, the one about how far they are going to go in this thing which the Supreme Court says is a right, but you cannot enforce it in a Court, as they said in the restriction or covenant case, how far they are going to go. They haven't gone quite this far yet, and I do not know that they ever will. Maybe they will. Maybe they will do it just like you asked them to. But certainly you do not have any case that says that they will go that far. The farthest I have seen them go is Barrows against Jackson.
>
> The second is the question the jury asked me, and you do not have any case citing that.
>
> So if you want some new law made, you will have to get it made somewhere else.
>
> The motion is denied.

The Notice of Appeal and Assignments of Error properly preserved the various federal constitutional questions

raised in the trial court (R. 26). The petition for writ of error and supersedeas to the Supreme Court of Appeals of Virginia properly presented the same for decision. The Supreme Court of Appeals of Virginia disposed of these questions by a judgment or order summarily refusing said writ of error and supersedeas (R. 69, 70).

Reasons for Granting the Writ

These cases involve substantial questions affecting constitutional rights of great public importance resolved by the court below in conflict with principles expressed by this Court or in advance of determination by this Court.

I.

The public importance of the issues presented.

The instant cases arise out of the proliferating "sit-in" demonstrations and raise federal questions of great public importance undecided by this Court. These petitioners were two of the student leaders who led the successful "sit-in" demonstrations against the denial of equal treatment in public places of accommodation in that part of the greater Washington Metropolitan area located in Virginia and Maryland. Even though their activity, in conjunction with others, achieved a substantial change in the racial discriminatory policies and practices in the area,[1] these petitioners were involved in many arrests and convictions in Maryland and in the instant cases in Virginia.

Although the "sit-in" demonstrations against discrimination in, and exclusion from, public places of accommodations "received widespread approval, many demonstrations

[1] Washington Post, July 1, 1960 and August 21, 1960.

resulted in arrests of persons involved, and, since many of the convictions have been appealed, serious constitutional questions have been raised."[2] These demonstrations, beginning in February, 1960, spread quickly throughout the South and into other sections of the Country,[3] and involved, during the past year, thousands of students nationally in activity similar to that for which the petitioners have been convicted.[4]

In a large number of places, this nationwide protest has prompted startling changes in the practices of racial discrimination and exclusion in places of public accommodation with the result that service is now afforded in many additional areas on a non-segregated basis. The number of cities, prompted by these demonstrations, opening facilities on a non-segregated basis was at one time reported as 112, *New York Times,* October 18, 1960, page 47, col. 5 (late city edition). However, this figure is daily increasing with announcements like those from Atlanta, *New York Times,* July 30, 1961 and August 13, 1961, pages 56 and 42 respectively, and Dallas, *Newsweek,* August 7, 1961, page 26.

Despite widespread gains in non-discriminatory treatment at places of public accommodation which enhanced the Country's prestige internationally, most of these demonstrations, as in the case at bar, have culminated in arrests and criminal prosecutions which variously present as underlying questions the issues presented herein. Many of these cases have already reached the appellate courts of

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[2] *Lunch Counter Demonstrations: State Action and the Fourteenth Amendment,* 47 Va. L. Rev. 105. For a concise treatment of the history and magnitude of these demonstrations see *ibid.;* see also Pollitt, *Dime Store Demonstration Events and Legal Problems of the First Sixty Days,* 1960, Duke Law Journal 315 (1960).

[3] 6 Race Relations Law Reporter, No. 1, p. 2.

[4] A Bibliography of the Student Movement Protesting Segregation and Discrimination, Tuskegee Institute, Alabama, 1960.

Louisiana,[5] North Carolina,[6] Florida,[7] Maryland,[8] Arkansas,[9] Alabama,[10] Georgia,[11] South Carolina,[12] Texas,[13] and Virginia;[14] countless others are at the trial level in those states and, additionally, in Kentucky, Tennessee, West Virginia and Mississippi.

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[5] E.g., *Garner* v. *Louisiana*, cert. granted 29 U. S. L. Week 3276 (No. 617, 1960 Term; renumbered No. 26, 1961 Term); *Briscoe* v. *Louisiana*, cert. granted, Id. (No. 618, 1960 Term; renumbered No. 27, 1961 Term); *Hoston* v. *Louisiana*, cert. granted, Id. (No. 619, 1960 Term; renumbered No. 28, 1961 Term).

[6] E.g., *Avent* v. *North Carolina*, petition for cert. filed, 29 U. S. L. Week 3336 (No. 943, 1960 Term; renumbered No. 85, 1961 Term); *Fox* v. *North Carolina*, petition for cert. filed, Id. (No. 944, 1960 Term; renumbered No. 86, 1961 Term); *Williams* v. *North Carolina*, petition for cert. filed 29 U. S. L. Week 3319 (No. 915, 1960 Term; renumbered No. 82, 1961 Term).

[7] E.g., *Steele* v. *City of Tallahassee*, cert. denied 29 U. S. L. Week 3263 (No. 671, 1960 Term); *Steele* v. *City of Tallahassee*, 120 So. 2d 619 (Fla. 1960); *State ex rel. Steele* v. *Stoutamire*, 119 So. 2d 792 (Fla. 1960).

[8] E.g., *Griffin* v. *Maryland*, petition for cert. filed Aug. 4, 30 U. S. L. Week 3058 (No. 287, 1961 Term); *Drews* v. *State*, 167 A. 2d 341 (Md. 1961), jurisdictional statement filed 29 U. S. L. Week 3286 (No. 840, 1960 Term; renumbered No. 71, 1961 Term).

[9] E.g., *Briggs* v. *State*, Ark. Sup. Ct. (No. 4992) with which *Smith* v. *State* (No. 4994) and *Lupper* v. *State* (No. 4997) have been consolidated.

[10] E.g., *DuBose* v. *City of Montgomery*, 127 So. 2d 845 (Ala. App. 1961); cf. *King* v. *City of Montgomery*, 128 So. 2d 340 (Ala. App. 1961).

[11] E.g., *Samuels* v. *State*, 118 S. E. 2d 231 (Ga. App. 1961); *Martin* v. *State*, 118 S. E. 2d 233 (Ga. App. 1961); *Walker* v. *State*, 118 S. E. 2d 284 (Ga. App. 1961); cf. *King* v. *State*, 119 S. E. 2d 77 (Ga. App. 1961).

[12] E.g., see Petition for Cert., p. 27 note 15, *Briscoe* v. *Louisiana*, *supra*, note 5.

[13] E.g., *Crossley* v. *State*, 342 S. W. 2d 339 (Tex. Crim. App. 1961); *Rucker* v. *State*, 342 S. W. 2d 325 (Tex. Crim. App. 1961); *Briscoe* v. *State*, 341 S. W. 2d 432 (Tex. Crim. App. 1960); *Tucker* v. *State*, 341 S. W. 2d 433 (Tex. Crim. App. 1960); *Johnson* v. *State*, 341 S. W. 2d 434 (Tex. Crim. App. 1960); *Rucker* v. *State*, 341 S. W. 2d 434 (Tex. Crim. App. 1960).

[14] *Randolph* v. *Commonwealth*, petition for cert. filed, 30 U. S. L. Week 3040 (No. 248, Oct. Term 1961).

Beyond the multiplicity of litigation which has resulted from these student demonstrations, they have created new problems for local law enforcement authorities[15] and they have spurred the enactment of new laws or more stringent amendments to existing laws,[16] as in the instant case.

It is therefore of great public importance that this Court consider the issues presented herein so that the courts below, and people everywhere, can be authoritatively apprised regarding the constitutional limitations on state prosecutions of young people for engaging in this type of activity in order to secure that equality enjoyed by other free people. *Slagle* v. *Ohio*, 366 U. S. 259; *Raley* v. *Ohio*, 360 U. S. 423.

II.

Constitutional questions resolved by the Court below in conflict with or in advance of this Court's decisions.

A. The decision below affirming a criminal conviction procured by interpreting and applying the state's "Trespass after Warning" statute as eliminating any requirement of "scienter" or "mens rea" conflicts with decisions of this Court and resolves important constitutional questions not yet determined by this Court.

While the interpretation of state legislation is primarily the function of state authorities, judicial and administrative, the construction given a state statute by the state courts is only binding upon the federal courts as to the meaning of the construed provisions. *Albertson* v. *Millard*,

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[15] Cf. *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960).

[16] E.g., see Va. Acts, 1960, ch. 97; see S. C. Acts, 1960, No. 743; La Acts, 1960, Nos. 70, 77, 80; Dallas, Tex., 1960 Ordinance (6 Race Rel. L. Rep. 317).

345 U. S. 242. The supremacy of the Constitution, as well as this Court's ultimate authority in the exposition of the law of the Constitution, is clearly established. *Cooper* v. *Aaron*, 358 U. S. 1. This Court has announced as its duty ultimately to pass on the substantive sufficiency of a claim of federal right. *First National Bank of Guthrie Center* v. *Anderson*, 269 U. S. 341.

Preliminary to the completion of the Commonwealth's case, petitioners did not make any motions attacking the validity of Title 18.1-173 of the Virginia Code or the indictment thereunder, relying upon the authority of *Hall* v. *Commonwealth*, 188 Va. 72, and *Martin* v. *Struthers*, 319 U. S. 141. In *Hall* v. *Commonwealth*, *supra*, the Virginia Court of Appeals, while passing upon the validity of this section (prior to the 1960 amendment), concluded that there was nothing in this section, when properly applied, which infringed upon the guarantees of the Fourteenth Amendment.[17]

Upon the completion of the Commonwealth's case, petitioners, thereafter, and at every available procedural opportunity, sought to assert that their federal rights were being violated by an interpretation and application of this section of the Code which eliminated any requirement of "scienter" or "mens rea" for a conviction (*supra*, pp. 5-9). That this precise issue was clearly drawn is indicated by argument of counsel for petitioners and the Commonwealth, by the jury's request for further instruction, and by the various adverse rulings of the trial court, to which proper exceptions were taken. The trial court's position in this matter, which now stands affirmed by the Supreme Court

[17] See *Martin* v. *Struthers*, *supra*. The reference by this Court in notes 10 and 11 of the *Martin* case, *supra*, 147, to the Virginia "Trespass After Warning" statute, as well as to similar statutes in other states, is no authority for the instant interpretation and application.

of Appeals of Virginia, was that a violation of this section occurred when the owner, or person in charge, requested another to withdraw from the premises and such other failed to comply. The sum of the trial court's rulings was that a conviction was proper where the evidence merely established a request by the owner, or person in charge, to withdraw from the premises, given to anyone upon the premises without authority of law. The court instructed the jury that the meaning of the phrase "authority of law" contained in the statute meant "some legal writ of entry or some right of a tenant, some person who had the right of the property" (Tr. 61-62). The court further instructed the jury that a person could be requested "to leave a restaurant such as Howard Johnson's, serving the public, without cause" and that evidence of such refusal, without more, was sufficient to sustain a conviction.

The decision below affirming the conviction is an adverse determination of petitioners' claim that the instant interpretation and application of this trespass statute by state courts, excluding as an element of the crime any requirement of "scienter" or "mens rea", was violative of the rights guaranteed by the Fourteenth Amendment. Mr. Justice Frankfurter's statement in his concurring opinion in *Marsh* v. *Alabama*, 326 U. S. 501, 510, is thus apropos to the present posture of this matter:

> "But when decisions by state courts involving local matters are so interwoven with the decision of the question of Constitutional rights that one necessarily involves the other, state determination of local questions cannot control the Federal Constitutional right."

This petition seeks to present to this Court for its determination the question of whether the Commonwealth's instant interpretation and application of this statute is permissible under the Constitution.

This Court has held that there are constitutional limitations upon the legislature in enacting and the judiciary in interpreting and applying statutes so as to eliminate any requirement of "scienter" or "mens rea" as a prerequisite to criminal punishment. *Morisette* v. *U. S.*, 342 U. S. 246.[18]

Where this Court has found that these constitutional limitations have been exceeded the convictions have been set aside. *Smith* v. *California*, 361 U. S. 147; *Lambert* v. *California*, 355 U. S. 225; *Morisette* v. *U. S.*, *supra*. In applying these decisions it should be remembered that "scienter", "mens rea" or "knowledge" refer to actual distinctive states of mind varying, of course, with the particular offense. Jerome Hall, *General Principles of Criminal Law* (2nd Ed.) 1960, pp. 70-71. As Professor M. Perkins, *Criminal Law* (1957) pp. 681-683, has suggested, since "scienter" and "mens rea" are frequently employed as synonyms, and since they have also been employed as a synonym of knowledge, the need, therefore, is to search for the state of mind, or states of mind, which the courts have spoken of as "knowledge."

Though the distinctive states of mind which this Court has found necessary vary with the particular offense, and though these distinctive states of mind may be referred to as "knowledge," "mens rea," "scienter," or in other terms, the decisions of this Court establish that there are Constitutional limitations on the power to eliminate "state of mind" as an element of criminal conduct. The dissenting Judges in *Lambert* v. *California*, *supra*, acknowledge, with the majority, such limitations but only disagreed as to whether the statute in question has transgressed the permissible limits.

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[18] Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043, observes that the "opinion by Mr. Justice Jackson ended the spreading development of criminal liability without fault . . ."

No justification has been proposed by the Commonwealth, and it is submitted that none exist, for treating this offense of trespass to land under the heading of "public welfare offenses," [19] or under that category of offenses where this Court has approved strict liability. Permitting the application of the doctrine of strict liability to this trespassory offense would signal a substantial alteration in the field of criminal law and would imperil and undermine presently existing constitutional safeguards on the exercise of the state's police power to punish for crime.

Whether the interpretation and application of the statute here in a manner creating strict liability exceeded the due process limitations suggested by this Court frequently under the descriptive mental state of "knowledge," the interpretation and application here was arbitrary and discriminatory. *Griffin* v. *State*, 351 U. S. 12, 18; *Cole* v. *Arkansas*, 339 U. S. 196.

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[19] Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55 (1933). Professor Sayre's eight general categories may be summarized as follows:

"(1) Illegal sales of intoxicating liquor;
  (a) sales of prohibited beverage;
  (b) sales to minors;
  (c) sales to habitual drunkards;
  (d) sales to Indians or other prohibited persons;
  (e) sales by methods prohibited by law;
(2) Sales of impure or adulterated food or drugs;
  (a) sales of adulterated or impure milk;
  (b) sales of adulterated butter or oleomargarine;
(3) Sales of misbranded articles;
(4) Violations of anti-narcotic acts;
(5) Criminal nuisances;
  (a) annoyances or injuries to the public health, safety, repose, or comfort;
  (b) obstructions of highways;
(6) Violations of traffic regulations;
(7) Violations of motor-vehicle laws;
(8) Violations of general police regulations, passed for the safety, health, or well-being of the community."

It was arbitrary for the court below to refuse to apply the law announced in *Wise* v. *Commonwealth*, 98 Va. 837, to the instant case. Each of these petitioners was charged with a violation of Title 18.1-173, Virginia Code 1950 (1960 Amendment) (*supra*, p. 3) in the following pertinent language:

> "that (petitioners) did, on the 10th day of June, 1960, in said County without the authority of law, remain upon the premises of another, after having been forbidden to do so, either orally or in writing by the person lawfully in charge thereof, *unlawfully* and against the peace and dignity of the Commonwealth." (Emphasis supplied) (R. 1, 2).

In *Wise* v. *Commonwealth*, *supra*, the defendant was charged with a violation of what is now Title 18.1-172 of the Virginia Code.[20]

These petitioners were charged in the language of "unlawfully" as was the defendant in the *Wise* case. Thus the necessary distinctive mental state required for conviction of the petitioners was that required in the *Wise* case. These petitioners sought to have the courts below apply the same rule of law to them as was applied in the *Wise* case. In the *Wise* case the Supreme Court of Appeals of Virginia stated in its opinion on pp. 838-839.

> "At the trial the prisoner offered, but was not permitted, to prove by counts that this verbal contract

[20] §18.1-172. Injuring, etc., any property, monument, etc.—If any person, unlawfully, but not feloniously, take and carry away, or destroy, deface or injure any property, real or personal, not his own, or break down, destroy, deface, injure or remove any monument erected *for the purpose of marking the site of any engagement fought during the War between the States*, or for the purpose of designating the boundaries of any city, town, tract of land, or any tree marked for that purpose, he shall be guilty of a misdemeanor. Virginia Code 1950 [1960 Amendment].

with respect to the disputed land had been transferred to him. It is not pretended, of course, that this verbal contract or understanding passed title, *but it does bear upon the bonafides of a claim of right asserted by the prisoner, and should have been admitted.*"

"The prisoner asked the court to instruct the jury as follows: *'The court instructs the jury, if they believe from the evidence that the defendant, John Wise, pulled down the fence and left it down under a claim of right, believing it to be his own, and believing that he had a bonafide right thereto, then the jury shall find for the defendant'.*"

"*This instruction propounds the law correctly, and should have been given.*" (Emphasis supplied.)

These convictions resulted from a failure to apply the same rule of law to these petitioners as was applied in *Wise*. This arbitrary and discriminatory action is a violation of decisions of this Court.

In addition, the instant interpretation and application arbitrarily eliminated the recognized principle of Anglo-American criminal law of concurrence:

"The remaining step in the above indicated stages of analysis of criminal conduct concerns situations where there was a mens rea and an act and, also, a harm of some sort, but still no penal liability because an additional material element was missing, namely, the fusion of the legally material thought and effort in conduct, which Anglo-American criminal law designates as "concurrence." The principle of concurrence requires that the mens rea (the internal fusion of thought and effort) coalesce with the additional mani-

fested effort ("act"), that they function externally as a unit to comprise criminal conduct. As was previously stated, this is a way of making certain that the defendant's conduct was criminal, i.e. that his conduct actually exp[illegible] mens rea. The efforts of prosecutors to established concurrence by invoking the tort rule of trespass ab initio, so that a legal entry would be found criminal because of the defendant's subsequent misconduct, have been unsuccessful." *Hall, supra*, pp. 185-190.

Likewise, *Perkins, supra*, p. 725, observes that the doctrine of trespass *ab initio*, firmly entrenched in the law of torts, has no application in criminal jurisprudence. The "trespass after warning" statutes came into existence because of the principle of concurrence. These statutes created an act, "remaining," which could concur with the necessary state of mind, "after warning."

The instant interpretation and application by which these convictions were obtained makes the statute so vague, indefinite, and uncertain as to offend the due process clause of the Fourteenth Amendment as construed in applicable decisions of this Court. *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Winters* v. *N. Y.*, 333 U. S. 507. This Court has often held that criminal laws must define crimes sought to be punished with sufficient particularity to give fair notice as to what acts are forbidden. As the Court held in *Lanzetta* v. *N. J.*, *supra*, 453, "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what crimes are forbidden." See also *United States* v. *L. Cohen Grocery*, 255 U. S. 81, 89; *Connally* v. *General Const. Co.*, 269 U. S. 385; *Raley* v. *Ohio*, *supra*. The statutory provision applied to convict petitioners in this case is so vague that it offends the basic notions of fair play in the

administration of criminal justice that are embodied in the due process clause of the Fourteenth Amendment.

Moreover, the statute punished petitioners' protest against racial segregation practices and customs in the community; for this reason the vagueness is even more invidious. When freedom of expression is involved the principle that penal laws may not be vague must, if anything, be enforced even more stringently. *Cantwell* v. *Conn.*, 310 U. S. 296, 308-311; *Scull* v. *Virginia*, 359 U. S. 344; *Watkins* v. *U. S.*, 354 U. S. 178; *Herndon* v. *Lowry*, 301 U. S. 242, 261-264.

(1) This statute, as now interpreted and applied, is indefinite as to what constitutes a valid right to enter or remain. See *Commonwealth* v. *Richardson*, 313 Mass. 632.

(2) With *"bona fide* claim" eliminated as a defense to the statute, there are no adequate statutory or other guides to inform a reasonable man as to what he may or may not do in terms of entering or remaining.

As this Court stated in *Winters* v. *New York, supra*, 520, a case which invalidated on the grounds of vagueness a state law applied to limit free expression: "Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained". In this case the state has indiscriminately classified and punished innocent actions as criminal. The result is an arbitrary exercise of the state's power which offends due process. *Wieman* v. *Updegraff*, 344 U. S. 183, 191. The decision below affirming these convictions is in conflict with decisions of this Court testing statutes under the established criteria of the "void for vagueness" doctrine. *Jordan* v. *DeGeorge*, 341 U. S. 223.

B. The decision below affirming these convictions is in conflict with prior decisions of this Court prohibiting racially discriminatory state action.

The testimony of the state's own witnesses clearly establishes that the two young Negro petitioners went into a public restaurant, made certain purchases, but upon seating themselves at a counter and requesting service, even though persons who entered before, with and after the petitioners were served without incident, petitioners were denied service and requested by the owner to leave the premises because he believed there was a law prohibiting the serving of colored people. It is clear that petitioners were refused service and asked to leave solely because they were Negroes and stand convicted as a result of the use of the state's criminal process to effectuate a policy and practice of racial discrimination. The petitioners' race was the only basis for the police officer's command that they leave these premises and for the arrests which followed. Obviously this is the inference which the jury had drawn from the evidence when they propounded the question:

> "Does 'trespassing' mean that a person can be asked to leave a restaurant such as Howard Johnson's, serving the public, without cause" (Tr. 61)?

As long ago as *Gibson* v. *Mississippi*, 162 U. S. 565, a case involving a claim of discrimination in jury procedures, this Court stated the broad proposition that racial discrimination in the administration of criminal laws violates the Fourteenth Amendment. The court said at 162 U. S. 565, 591:

> "The guaranties of life, liberty, and property are for all persons within the jurisdiction of the United States or of any state, without discrimination against any

> because of their race. Those guaranties, when their violation is properly presented in the regular course of proceedings, must be enforced in the courts, both of the nation and of the state, without reference to considerations based upon race. In the administration of criminal justice no rule can be applied to one class which is not application to all other classes."

This Court has repeatedly struck down statutes and ordinances which provided criminal penalties to enforce racial segregation. *Buchanan* v. *Warley*, 245 U. S. 60; *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Gayle* v. *Browder*, 352 U. S. 903, affirming 142 F. Supp. 707 (M. D. Ala. 1956); *State Athletic Commission* v. *Dorsey*, 359 U. S. 533, affirming 168 F. Supp. 149 (E. D. La. 1958), were all cases in which criminal laws used to maintain segregation were invalidated. Cf. *Evers* v. *Dwyer*, 358 U. S. 202. Likewise, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, the Court nullified a criminal prosecution under a statute which was fair on it face but was being administered to effect a discrimination against a single ethnic group.

While it may be argued by the Commonwealth that in this case the racial discrimination against petitioners is beyond the reach of the Fourteenth Amendment because it originated with the decision of a "private entrepreneur" to establish a "white-only" lunch counter in deference to local customs and traditions, this is not dispositive of the case because it is racial discrimination by agents of the Commonwealth of Virginia which affords the primary basis for these prosecutions. It was the police officer acting as law enforcement representative of the Commonwealth who commanded petitioners to leave their seats at the lunch counter because petitioners were Negroes and the counter was maintained for white people. It was the police officer who arrested petitioners for failure to obey this command.

It was the public prosecutor who charged petitioners with an offense, and it was the State's judiciary that convicted and sentenced them. Thus, from the policeman's order, the conviction and punishment, the Commonwealth was engaged in enforcing racial segregation with all of its law enforcement machinery.

This racial discrimination may fairly be said to be the product of state action within the reach of the Fourteenth Amendment which "nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." *Civil Rights Cases*, 109 U. S. 3, 11. As stated by the Court in *Cooper* v. *Aaron*, 358 U. S. 1, 17:

> "Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, . . . (citing cases) . . . ; or whatever the guise in which it is taken, . . . (citing cases)."

Just as judicial enforcement of racially restrictive covenants was held to constitute state action in violation of the Fourteenth Amendment in *Shelley* v. *Kraemer*, 334 U. S. 1, and *Barrows* v. *Jackson*, 346 U. S. 249, so in this case judicial enforcement of a rule of racial segregation in privately owned lunch counters operated as business property opened up for use by the general public should likewise be condemned.

In *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722, Mr. Justice Clark, delivering the opinion of the Court, stated:

> "Because the virtue of the right to equal protection of laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is 'an impossible task' which 'this Court has attempted.' Kotch v. Board of River Port Pilot Com'rs, 330 U. S. 552, 556, 67 S. Ct. 910, 912, 91 L. Ed. 1093. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

And as Mr. Justice Frankfurter observed in his dissent, 727:

> "For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment."

By the interpretation and application of the trespass statute under the circumstances here the Commonwealth has not merely placed its authority behind discriminatory treatment based solely upon race, but the Commonwealth has so involved itself in thus employing its criminal process and thereby erecting criminal sanctions that it now stands enmeshed. Under prior decisions of this Court, these convictions resulted from invalid state action.

C. The decision below affirming these convictions is in conflict with or in advance of this Court's decisions prohibiting unwarranted state interference with the exercise of rights protected by the Fourteenth Amendment.

Independent of any question of the racially discriminatory use of its criminal process, this Court has held that the employment of the state criminal process is prohibited state action where its use amounts to prohibitive interference with the exercise of constitutional rights. *Marsh* v. *Alabama, supra.* The employment of the criminal machinery by the Commonwealth was an unwarranted interference with the enjoyment of the rights of expression and of association, the right to secure property, and the right to the enjoyment of liberty which are guaranteed by the Fourteenth Amendment.

In the *Marsh* case, *supra,* after the Supreme Court established that the defendants had a right to distribute religious literature upon the private premises of a company owned town, the Court found that the use of the state's criminal machinery to punish or impede those in the exercise of that right was unconstitutional. That is to say, statutes otherwise valid are invalidly applied in such situations. *Yick Wo* v. *Hopkins, supra.*

In the celebrated case of *Cunningham* v. *Neagle,* 135 U. S. 1, the Supreme Court reviewed the problem of the use of the state criminal process to impede, hamper and frustrate the exercise of the national power. The court reaffirmed the proposition that the State's police power was subject to the Supremacy Clause of the United States Constitution. Art. VI, cl. 2. The Court stated at 70 and 72:

> "... the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as Mar-

shal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State of California."

Where there had been an exercise of the criminal process or a threat to exercise such process, even as remote as criminal sanction by way of contempt following injunctive relief for conduct protected by the First Amendment, the Supreme Court has prohibited such state intervention. *Watson* v. *Jones*, 13 Wall. 679; *Cantwell* v. *Connecticut*, *supra*; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Davis* v. *Balson*, 133 U. S. 333; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Patterson* v. *Colorado*, 205 U. S. 454; *Near* v. *Minnesota*, 283 U. S. 697; *Jones* v. *Opelika*, 319 U. S. 103; *DeJonge* v. *Oregon*, 299 U. S. 353.

Petitioners entering and remaining upon the premises of this public restaurant sought to procure service under the same circumstances and conditions of other patrons and upon refusal to demonstrate and convey to others knowledge of racial discriminatory treatment in the expectation that an orderly change of policy would ensue as a result of the dissemination of this information by this form of protest. Their expression (asking for service) was entirely appropriate to the time and place in which it occurred. Certainly the invitation to enter an establishment carries with it the right to discuss and even argue with the proprietor concerning terms and conditions of service so long as no disorder or obstruction of business occurs.

Petitioners did not shout, obstruct business, carry picketing signs, give out handbills, or engage in any conduct inappropriate to the time, place and circumstances. There was no invasion of privacy involved in this case, since the

lunch counter was an integral part of commercial property open up to the public.

The liberty secured by the due process clause of the Fourteenth Amendment insofar as it protects free expression is hardly limited to verbal utterances. It covers picketing, *Thornhill* v. *Alabama*, 310 U. S. 88; free distribution of handbills, *Martin* v. *Struthers*, *supra*; display of motion pictures, *Burstyn* v. *Wilson*, 343 U. S. 495; joining of associations, *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; the display of a flag or symbol, *Stromberg* v. *California*, 283 U. S. 359. What has become known as a "sit in" is a different but obviously well understood symbol, a meaningful method of communication.

This "sit in" occurred in a place entirely open to the public and to petitioners as well. That the premises were privately owned should not detract from the high constitutional position which such free expression deserves. This is hardly a case involving, for example, expression of views in a private home or other restricted area private in nature. The establishment here was open to the public and the patronage of the public, including that of Negroes was sought.

This Court in the *Marsh* case *supra*, 506, rejected argument that being present upon private property per se divests a person of the constitutional right of free expression:

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . ."

In that case this Court held unconstitutional convictions of Jehovah's Witnesses for trespass for proselytizing on private property of a company town. See also, *Republic*

Aviation Corp. v. *National Labor Relations Board,* 324 U. S. 793, 801, note 6; *National Labor Relations Board* v. *Babcock and Wilcox Co.,* 351 U. S. 105, 112; *United Steelworkers* v. *National Labor Relations Board,* 243 F. 2d 593, 598 (D. C. Cir. 1956), rev. on other grounds, 357 U. S. 357; *People* v. *Barisi,* 193 Misc. 934, 86 N. Y. S. 2d 277, 279 (1948); *Freeman* v. *Retail Clerks Union,* 45 Lab. Rel. Ref. Man. 2334 (Wash. Super. Ct. 1959).

These decisions, of course, are manifestations of the fundamental view, stated in *Munn* v. *Illinois,* 94 U. S. 113, 126, that "when . . . one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. . . ."

As this Court stated in *Bates* v. *Little Rock,* 361 U. S. 516, 524:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

There is no showing, and there can be none, of a controlling justification for the limitation upon freedom of expression and association which this interpretation and application of the trespass law imposes. *N. A. A. C. P.* v. *State of Alabama, supra.*

Therefore, having no valid interest to preserve, the Commonwealth has no power to interfere by use of its criminal process with the expression and association in which petitioners were engaged.

The dedication of the property involved in this restaurant business altered the rights of the owner and members of the public. The state's action here was an unwarranted

infringement upon petitioners' right to contract, to secure property and to otherwise enjoy the liberties of free men unimpaired by the action of the state. In *Valle* v. *Stengel*, 176 Fed. 2d 697, 703, the court stated:

> "If a man cannot make or enforce a contract already made because of the interference of a State officer he is being denied a civil right. He cannot support himself or his family or earn a living under the system to which we adhere. The *liberty* involved is in fact the liberty of the contract. Cf. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832. To refuse to an individual the liberty of contract is to put him beyond the pale of capitalism. Thus ostracized, he cannot engage in the acquisition of property or in the pursuit of happiness."

And as this Court observed in *Bolling* v. *Sharpe*, 347 U. S. 497:

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

Finally, that this private restaurant which is open for the public is not an untouchable island in our midst because of its dedication is too clear to be debated. This restaurant is subject to myriad laws and regulations; and that it is affected with a public interest is everywhere apparent; and, much more important it must also be operated in accord with the law of the land which includes a prohibition against racially discriminatory state action. No power to cut off the food and drug supply from millions of Americans can possibly be said to reside either in the mercurial protection of the merchant's self interest or his prejudicial aberrations.

These petitioners, then, had a right to be in this restaurant and to be served as others; and only reasonable grounds for exclusion or refusal to serve could revoke the enjoyment of this right with state sanction or assistance. It is submitted that race or color is not such a reasonable basis. Thus the state sanction and assistance by these arrests and convictions was an unwarranted infringement upon rights of petitioners of expression and of association, the right to contract and to secure property, and to otherwise enjoy the liberties of free men, guaranteed by the Constitution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 25th day of April, 1961.

The petition of Lawrence George Henry for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Arlington County on the 3rd day of November, 1960, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, No. 2754, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

/s/ H. G. Turner
Clerk

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 25th day of April, 1961.

The petition of Dion Tyrone Diamond for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Arlington County on the 3rd day of November, 1960, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, No. 2755, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

/s/ H. G. Turner
Clerk